

The defendant, Anthony Irvin, has been charged with two counts of Terroristic Threatening in violation of Title 11, Section 621(a)(1), one count of Offensive Touching in violation of Title 11, Section 601(a)(1), and one count of Disorderly Conduct by Fighting or Violent Tumultuous or Threatening Behavior in violation of Title 11, section 1301(1)(a). Prior to trial, the defendant moved to dismiss all charges pursuant to Court of Common Pleas Criminal Rule 12(b) on the

grounds that the State failed to preserve case dispositive evidence consisting of a surveillance video. After carefully considering the arguments made by the defendant and the State for the defendant's motion to dismiss, the defendant's motion to dismiss is denied. However, the Court will consider whether to provide the *Deberry* lost evidence instruction to the trier of fact or dismiss charges after it has heard the evidence provided at trial.<sup>1</sup>

## FACTS

The defendant is charged with multiple violations of Title 11 of the Delaware Code, including Terroristic Threatening, Offensive Touching, and Disorderly Conduct. A surveillance video existed of the incident. The State concedes that the surveillance video, if in the State's possession, would be subject to disclosure with a duty to preserve under Court of Common Pleas Criminal Rule 16 and *Brady v. Maryland*, 373 U.S. 83 (1963). The State admits that the surveillance video would have shown the alleged altercation. Testimony was presented to the Court on June 11, 2018, surrounding the circumstances of the missing evidence.

On November 28, 2017, Dover Police Officers Corporal Wood and Corporal Chandler arrived at Connections to respond to an alleged assault. While on the scene, both officers viewed surveillance video footage of the main entrance area and parking lot of Connections. They were able to observe a physical altercation between the defendant, Anthony Irvin, and an alleged victim. Given this observation, the officers conducted a further investigation of the incident by talking to witnesses.

While at Connections, Corporal Chandler requested a copy of the surveillance video. A member of the Connections staff informed Corporal Chandler that there were technical difficulties

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<sup>1</sup> The Court will consider whether charges should be dismissed at trial should the defense move for acquittal after the presentation of the State's case-in-chief.

with copying the video footage at that time, but, the staff member believed the footage could be obtained at a later date. The staff member also notified Corporal Chandler that Connections would need something in writing to release the video. In late February or early March of 2018, Corporal Chandler asked Corporal Wood to contact Connections again to get a copy of the video. At that point, Connections made Corporal Wood aware that the individual who could download a copy of the video was currently out of town. Corporal Wood returned to Connections sometime after March 6 and was informed that there had been a problem downloading the video.

Kevin Hansen, the current network administrator for Connections, was the IT administrator of Connections on November 28, 2017. He informed one of the officers that Connections needed something in writing should the officers want a copy of the video footage. Mr. Hansen told officers that it was company policy to make a copy of the footage as soon as a request is received. Surveillance footage is typically on their system for 120 days. Then, it is wiped or overwritten. However, video footage can be captured by a Security Officer before it is wiped or overwritten so there will be a copy left on the hard drive. Mr. Hansen further testified that it was his belief the copy of the surveillance footage was captured in February. Mr. Hansen was contacted between late March and early April because there was a problem retrieving a copy of the video. The Security Officer who normally handles the capturing and downloading of video was not able to recover the video. After attempting to get a copy of the video, Mr. Hansen discovered it was not previously captured. As a result, Mr. Hansen could not obtain the full length of the video, only worthless parts that were not written over.

The State had a subpoena served on Connections on June 5, 2018, requesting a copy of the surveillance video for trial. However, by then, the video was not available.

## PARTY CONTENTIONS

In essence, the defendant contends that pursuant to *Deberry v. State*, the Terroristic Threatening, Offensive Touching, and Disorderly Conduct charges against him should be dismissed on the grounds that the State failed to preserve case dispositive evidence that was in its possession.<sup>2</sup> It is the defendant's position that the surveillance video would be case dispositive as to whether (1) the defendant was innocent or acting in self-defense and (2) the police had probable cause to arrest the defendant for the Terroristic Threatening, Offensive Touching, and Disorderly Conduct.<sup>3</sup>

The defendant argues that the surveillance video would be case dispositive for several reasons. First, the video was used to determine who to arrest after the altercation. It is the defendant's position that the video was neutral evidence that neither party could spin or impact. The secondary or substitute evidence available for the State is the witnesses' testimony of the incident. The defendant contends that their testimony will not be nearly as probative as the video. Furthermore, the defendant contends that the issue of whether he began the physical altercation would be shown on the video as well as the nature of his actions when he was outside of Connections.

The State responds that there are multiple witnesses to the incident and their testimony is sufficient to prove that the defendant is guilty of the charges against him. Additionally, the State contends that the investigating police officers made reasonable efforts to retrieve the surveillance video.

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<sup>2</sup> Although the defendant did not cite *Deberry* during oral argument on the motion, the defendant's contentions are within the scope of a *Deberry* analysis.

<sup>3</sup> The Court recognizes that the missing video evidence was not the sole evidence used to support probable cause for an arrest, but rather, it was used as part of the investigatory process along with witness statements of the incident.

## LEGAL STANDARD

In a motion to dismiss a pending criminal charge, the defendant bears the burden of proving, by a preponderance of the evidence, that he or she is entitled to the dismissal as a matter of law. When deciding a defendant's motion to dismiss in a criminal matter, the Court must view any evidence offered in a light most favorable to the State in order to determine if an issue of material fact exists. *State v. Jackson*, 2000 WL 33113958, at \*3 (Del. Super. Nov. 27, 2000). If the Court finds that an issue of material fact exists, it will be precluded from granting a defendant's motion to dismiss. *State v. Yoder*, 2010 WL 1987844, at \*1 (Del. Com. Pl. Apr. 30, 2010).

## DISCUSSION

The defendant contends that the State had a duty to preserve the surveillance video and breached that duty when it failed to obtain it. The defendant argues that, as a result, the Court should dismiss the Terroristic Threatening, Offensive Touching, and Disorderly Conduct charges against him.

In *Deberry v. State*, the Delaware Supreme Court acknowledged "that the State's duty to disclose evidence includes a duty to preserve it as well. The obligation to preserve evidence is rooted in the due process provisions of the fourteenth amendment to the United States Constitution and the Delaware Constitution, article I, section 7." 457 A.2d 744, 751-52 (Del. 1983). Under *Deberry*, the State, including its police agencies, is obligated to preserve evidence which is material to the defendant's guilt or innocence as a matter of federal and state constitutional guarantees of due process. *Id.* at 752. In *Deberry*, the court developed a three-part test to examine claims that the State either failed to preserve evidence once in its possession or failed to collect evidence. *Id.* at 750; *Johnson v. State*, 27 A.3d 541, 545 (Del. 2011) (citing *Lolly v. State*, 611

A.2d 956 (Del. 1992)). In reviewing a claim that the State lost or destroyed exculpatory evidence, or failed to collect such evidence, the Court must consider the following:

- 1) would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady* [*v. Maryland*]?<sup>4</sup>
- 2) if so, did the government have a duty to preserve the material?
- 3) if there was a duty to preserve, was the duty breached, and what consequences should flow from a breach?

*Deberry*, 457 A.2d at 750 (citations omitted).

In analyzing the third question, the Court must further inquire “(1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of the other evidence adduced at the trial to sustain the conviction.” *Id.* at 752 (citations omitted). In particular, when examining the conduct of the State,

[T]he court should inquire whether the evidence was lost or destroyed while in [the State’s] custody, whether the [State] acted in disregard for the interests of the accused, whether [the State] was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification . . . . It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon existence of a motive to harm the accused.

*Id.* at 752 (Del. 1983).

The *Deberry* analysis “draws a balance between the nature of the State’s conduct and the degree of prejudice to the accused.” *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989). “The State must justify the conduct of the police or prosecutor, and the defendant must show how his defense was impaired by loss of the evidence.” *Deberry*, 457 A.2d at 752.

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<sup>4</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

In *Deberry*, the Delaware Supreme Court found that where the State provides inconclusive evidence when there is presumably strong evidence available, or would have been available, there is an implication that the strong evidence was adverse to the State. *Id.* at 754. In cases where the State fails to produce evidence, which may be inferred to be favorable to the defense, the court may overturn convictions and call for a retrial. *Id.* At retrial, the State may be required to stipulate that if the evidence was introduced, it would not contain any evidence incriminating the defendant. *Id.* In *California v. Trombetta*, the United States Supreme Court determined that the duty to preserve evidence “must be limited to evidence that might be expected to play a significant role in the suspect’s defense,” and that the “evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *California v. Trombetta*, 467 U.S. 479, 488-89 (1984). In matters where the evidence has not been preserved by the State, relevant considerations for the court include “the conduct of the State’s agents . . . the importance of the missing evidence, the availability of secondary evidence, and the sufficiency of the other evidence presented at trial.” *Hammond*, 569 A.2d at 87. If the State’s case is very weak without the evidence that was lost or destroyed, causing fundamental unfairness to the level that the prosecution should be barred for its denial of due process, the charges or conviction must be dismissed. The State must bear the responsibility for loss of evidence, so the court will infer that if the evidence were available it would have been exculpatory. *See Deberry*, 457 A.2d at 754.

Therefore, the first step in the *Deberry* analysis is to determine whether the surveillance video, if extant in the possession of the State, would have been subject to disclosure under Court of Common Pleas Criminal Rule 16 or *Brady*. *Id.* at 750. As the surveillance video is not available for review, this Court need not address whether it would have been discoverable under *Brady*. *Id.*

at 751 n.5 (stating that determining whether lost evidence would have been discoverable under *Brady* is considered an “artificial exercise”). Pursuant to Criminal Rule 16(b), “a defendant need only show that an item ‘may be material to the preparation of his defense’ to be discoverable.” *Johnson*, 27 A.3d at 546 (internal citations omitted) (citing *Deberry*, 457 A.2d at 752).

In this case, the defendant contends that the video is critical information that would be subject to disclosure because it is exculpatory and could be used to prove either self-defense or the defendant’s innocence. The State concedes that the information would have been subject to disclosure under Rule 16. The Court finds that the video was subject to disclosure.

The second step in the *Deberry* analysis is to determine whether the State had a duty to preserve the surveillance video. *Deberry*, 457 A.2d at 751-52. “[I]n fulfilling its duty to preserve evidence, law enforcement agencies should create rules broad enough to encompass any material that could be favorable to a defendant.” *Hunter v. State*, 55 A.3d 360, 369 (citing *Deberry*, 457 A.2d at 751-52). In *Hunter v. State*, the Delaware Supreme Court held that “increased diligence is required when a recording is made of an alleged event and the defendant is subsequently charged in connection with the event.” *Id.*

In this case, the defendant argues that the State did not collect the surveillance video, nor did it have Connections preserve the video when there was a duty to preserve. The State concedes that it had a duty to preserve the surveillance video. There was no testimony of any policy within the police department to preserve or collect evidence. The Court finds that the State had a duty to preserve the surveillance video.

The third step of the *Deberry* analysis is a three-part inquiry to determine the consequences that should flow from the State’s breach of its duty to preserve the evidence. *Deberry*, 457 A.2d at 752. The first factor is “the degree of negligence or bad faith involved.” *Johnson*, 27 A.3d at



546 (quoting *Bailey v. State*, 521 A.2d 1069, 1091 (Del. 1987)). In *Hunter*, the court found that the tape recording was not reviewed and the officer did not have knowledge “if the tapes would have been inculpatory or exculpatory for Hunter. Although the recording was ultimately overwritten, it was done automatically. There is no evidence that this was done deliberately or in bad faith.” *Hunter*, 55 A.3d at 369. In the present case, the defendant contends that the State had bad intent or was negligent by not preserving the video. The defendant relies on the fact that upon bringing charges, the State failed to make a timely effort to send a subpoena to Connections for a copy of the video, the police officers at the scene did not obtain a copy of the video and there was not a formal request by the police for the video until five months later. The State does not concede a breach of the duty to preserve. The State relies on the effort of the investigating police officers to obtain the video and the State’s subpoena to obtain a copy of the video. The Court finds the State and its actors negligent by failing to follow up on previous requests for a copy of the video and for waiting five months to subpoena the video.

The second factor the Court must consider in determining the consequences that should flow from the State’s breach is “the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available.” *Johnson*, 27 A.3d at 546 (quoting *Bailey v. State*, 521 A.2d at 1091). Here, the defendant argues that the surveillance video was the basis for the State’s case. The defendant further argues that without the video and without seeing the video, crucial evidence is missing that is exculpatory to the defense’s case. The defense contends that no testimony as to what is on the video would be the same as having the video itself. The State responds that the surveillance video is inculpatory rather than exculpatory. The State further contends that there is witness testimony of the incident and reliable evidence available that deem the surveillance video unnecessary to prove the State’s case.

The Court finds that the surveillance video is important and has probative value, but, it is not the only relevant evidence that will be presented by the State in its case-in-chief. Eyewitness testimony has been deemed probative and relevant. *Hunter*, 55 A.3d at 369. The other evidence that is to be presented has material value. It does not substitute for the video. But, it is reliable evidence.

The final factor the Court must consider in determining the consequences that should flow from the State's breach is "the sufficiency of other evidence produced at the trial to sustain [a] conviction." *Johnson*, 27 A.3d at 546 (quoting *Bailey*, 521 A.2d at 1091). The defendant contends that the surveillance video is case dispositive evidence. The defendant further contends that the Court must give exculpatory effect to the surveillance video, which would preclude the State from establishing that there was any reasonable and articulable suspicion or probable cause to arrest. Due to the ability of the testimony of witnesses to sustain a conviction, the Court will not dismiss the charges prior to trial.

Even though the charges should not be dismissed prior to trial, the State must still bear the responsibility for the loss of the surveillance video. "We remain convinced that fundamental fairness, as an element of due process, requires the State's failure to preserve evidence that could be favorable to the defendant '[to] be evaluated in the context of the entire record.'" *Hunter*, 55 A.3d at 370 (quoting *Hammond*, 569 A.2d at 87) (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976)); *Deberry*, 457 A.2d at 752; Del. Const. art. I, § 7. In addition to the preservation of evidence, "the State has a general duty to gather evidence." *Bailey*, 521 A.2d at 1090 (citing *Hughes v. State*, 490 A.2d 1034, 1049 (Del. 1985)). The surveillance video does not appear to be case dispositive at this point. A trial without the video evidence would not be fundamentally unfair.

The Court will consider the appropriate remedy to be imposed for the State's breach to collect and preserve a copy of the surveillance video after it has heard other evidence available at trial.

### CONCLUSION

The defendant's motion to dismiss is denied. However, the Court will consider whether to provide the *Deberry* missing evidence instruction to the trier of fact or dismiss charges after it has heard the evidence at trial.

**IT IS SO ORDERED this 7<sup>TH</sup> day of SEPTEMBER, 2018.**

A handwritten signature in dark ink, appearing to read "Charles W. Welch", written over a horizontal line.

CHARLES W. WELCH  
JUDGE